



# Generally Speaking

## Comings and Goings

Joyce Villard returned to the Labor & State Affairs Section as a LOA II in the Anchorage office.

Cariel John-Baptiste joined the Anchorage Collections & Support Section as an Administrative Clerk II.

AAG Kate Sheehan replaced AAG Brad Brinkman (who retired on June 30) in the Juneau Torts & Worker's Compensation Section. Kate was formerly employed with the Juneau Department of Administration as a labor relations analyst.

Congratulations to Bethel AAG Jennifer Joanis (Child Protection Section) who gave birth to a baby boy, Gabriel Scott Joanis, on July 24. AAG Susan Paterson, previously an AAG in Fairbanks, is filling in for Jennifer while she is on family leave.

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## CIVIL DIVISION

### Child Protection

**CINA cases.** New CINA cases of note based upon allegations in OCS petitions:

OCS substantiated allegations that a father had sexually abused his two and five-year-old daughters. The mother of the children had agreed to protect them from their father; however, she left them with him three months ago and they have been there since. OCS removed the children from both parents.

OCS took custody of a child after the mother reported to the hospital she did not want to be a parent. Instead, she wanted OCS to assume custody and find an adoptive placement for the child.

OCS received 16 reports of harm on three children in a family. Hazardous home conditions included domestic violence, ongoing drinking, lack of food (other than beer) in the home; lice on the children; and the four-year-old child reported to be walking down a busy street barefoot. Behavioral problems were also reported (including a seven-year-old breaking a hamster's leg and a ten-year-old suspended for hitting a school worker in the face), as well as substance abuse (by a caretaker), sexual abuse and medical and educational neglect. Despite a number of attempts to provide home preservation services to this family, OCS ultimately determined it needed to assume legal custody and provide an alternate placement for the children.

In another case, an incarcerated mother had left her children with a caretaker, but that caretaker was no longer willing to care for the children. The mother then instructed her children to take food from a store, which resulted in theft charges against the children. The mother has substance abuse, prostitution, and domestic violence issues. The children's father is out-of-state and has requested placement of the children with him. OCS will investigate this possibility.

OCS investigated allegations that a father had assaulted a mother, leaving a black eye and broken ribs. The father refused to let OCS workers talk to the mother

or children in the home. Troopers were called to the home, and ultimately the parents agreed to allow social workers to speak with an 11-year-old child. The child had bruising covering the left side of his face from the corner of the eye to the base of the jaw. He also had scratch marks in the area, and bruising on the lip. He denied having been hit by his father, but when his brother was interviewed, the brother said the father had hit his brother very hard.

OCS received information that a mother was going to be arrested on charges of human trafficking. OCS took custody of the children when the mother was arrested. The children's stepfather was already in jail.

In another case, the police found that a three-year-old had been left home alone from 2:45 a.m. until 7:00 a.m. when the mother returned. OCS took custody of the child.

### **Litigation**

***Native Village of Tanana v. State.*** The state filed its opposition to a motion for summary judgment seeking a declaration that Alaska Native villages have the inherent authority to initiate child protection cases. In *C.R.H.* the Alaska Supreme Court was asked to find that Alaska Native villages have such inherent authority, but resolved the case on other grounds, leaving intact prior Alaska Supreme Court decisions that the villages do not have inherent authority to initiate child protection cases. In its opposition, the state challenges the plaintiffs' assertion of inherent authority and argues that, even if Alaska Native villages once had it, Congress took it away from them when it enacted the Indian Child Welfare Act.

### **Miscellaneous**

AAG Poke Haffner attended a conference put on by Fairbanks child care expert Carol Brice.

AAG Michelle McComb traveled to Barrow to work with various participants in CINA cases in that area.

AAGs Carla Raymond and Becky Patterson attended training presented by the American Prosecutors' Research Institute entitled "*Equal Justice for Children: Investigation and Prosecution of Child Abuse*".

## **Commercial and Fair Business**

### **Consumer Protection/Anti-Trust**

**State Files Suit Against Manufacturers of Computer Memory Chips.** Alaska and 35 other states filed a complaint in the Northern District of California against several manufacturers of Dynamic Random Access memory ("DRAM") chips used in computers, servers, and other electronic storage devices. The complaint alleges several manufacturers, including Samsung, Micron, Hynix, Elpidia, and others, conspired to fix the price of DRAM. Most DRAM chips were sold to manufacturers like Dell, Gateway, Apple, Sony, and others for use in computers and other consumer electronic products. The lawsuit seeks to recover damages for the amount of overcharges attributable to the conspiracy, penalties, and injunctive relief.

**Northern Minerals Consent Judgment.** The state entered into a consent judgment with internet sellers of mineral cosmetics. The consent judgment resolved allegations that the owners of the business Northern Minerals aka Alyeska Minerals engaged in unfair or deceptive acts or practices in violation of the Alaska Unfair Trade Practices and Consumer Protection Act, by selling mineral cosmetics and other products to consumers through eBay and its website, but failed to provide the products to consumers or provide a refund. In addition to a ten-year ban on retail sales, the consent judgment requires the owners to provide a full refund to consumers still owed a refund, requires a partial payment of the state's costs and attorney fees, and permanently enjoins the owners from engaging in similar unfair or deceptive conduct.

### **Division of Banking and Securities**

On July 5, 2006 the Administrator of the Division of Banking and Securities adopted the Order on Summary Disposition of the OAH hearing officer arising from a proxy solicitation complaint filed by Leslie Hunter against Calista Corporation.

The hearing officer found Calista did not have a right to request a hearing before the OAH. A division regulation contains broad language regarding the right to a hearing, but the enabling statute only refers to hearings regarding four kinds of orders. The hearing officer concluded the right to a hearing before the

OAH only arises from one of the listed types of orders.

Since the division did not issue one of the listed orders, the hearing officer granted summary adjudication to the division and dismissed Calista's appeal for lack of jurisdiction. AAGs LuAnn Weyhrauch and David Brower represented the division on this matter and other related proxy solicitation complaints with respect to Calista Corporation.

## Environmental

**Drinking Water Regulations.** AAG Mary Lundquist assisted DEC in bringing its Long Term-1 Enhanced Surface Water Treatment (LT-1) drinking water regulations through the regulations process. The LT-1 regulations deal primarily with the new federal requirements for the treatment of surface water and groundwater under the direct influence of surface water for public water systems serving fewer than 10,000 people.

## Human Services

### **Litigation**

Two significant cases were resolved by decision this month:

***Myers v. Alaska Psychiatric Institute.*** The Alaska Supreme Court issued a decision in *Myers v. Alaska Psychiatric Institute*, \_\_\_P.3d \_\_\_ (Alaska 2006). The court held that the state statutes governing the non-emergency administration of psychotropic (mind-altering) medication to involuntarily committed mental patients are unconstitutional. Under the statutes, a state mental facility could administer psychotropic drugs to an involuntarily committed patient who refused to be medicated upon showing that the patient was unable to give or withhold informed consent regarding an appropriate course of treatment, and that the patient had not previously, while competent, expressed a desire to refuse psychotropic medication.

The court held that a person's right to refuse mind-altering medication is fundamental, and it concluded that the Alaska Constitution's guarantees of privacy and liberty, which the court held must be protected

and enforced by "courts, not physicians," require two additional showings before a non-consenting patient may be medicated in a non-emergency situation. The additional showings which must be made by clear and convincing evidence, are, first, that the treatment proposed by the facility is in the patient's best interests, and second, that no less intrusive alternative is available. AAG Mike Hotchkin, of the Opinions, Appeals and Ethics section, represented API in the appeal.

As a result of this decision, the section has amended how a case is presented on a petition for forced medication. The section now presents evidence that allows the court to make a "best interest" and a "no less intrusive alternative" finding. There have not been many forced medication petitions since the decision was issued. So far, the section has prevailed on all the petitions that have been litigated.

***Okuley v. DHSS, Division of Public Assistance.*** This litigation involves a violation of the APA relative to the interim assistance program (the state pays \$280.00 per month to individuals who are presumptively eligible for SSI). At issue in this case is the state's amendment of its policy and procedures to include a secondary review. In making that change, the state did not amend its regulations or comply with the Administrative Procedures Act. The superior court found that this violated the APA and voided the policy. A second issue in the matter was class certification. The state stipulated to a portion of the class and litigated the more complex class composition, which included those individuals known to be ineligible because they had exhausted their appeal rights at the SSA and were found ineligible for SSI benefits.

The state argued in a motion for summary judgment it was against public policy to pay individuals who were presumptively ineligible for benefits. The court disagreed and included these individuals in the class. This has a significant fiscal impact on DHSS (in excess of 1 million dollars). The section plans to meet this month with the commissioner's office to address how to implement the courts order.

**Certificate of Need (CON) program.** AAG Stacie Kraly has an oral argument in Fairbanks on August 8<sup>th</sup> related to the interpretation and application of the new CON regulations.

**Disability Law Center.** The Disability Law Center informed AAG Kraly that it was planning to release a report on the March 5, 2006 incident at API. The section had reviewed a draft of the report and had specifically requested that doctors' names be removed. The DLC did not agree but after considerable discussion did allow a brief window of time for AAG Kraly to prepare a motion for protective order. The matter is now before the court for a determination.

#### **Medicaid**

#### **Subrogation/Liens**

In July AAG Tim Twomey collected a total of \$251,729.85 as a result of 13 case resolutions. For calendar year 2006 to date, the total collected is \$1,331,158.45 (as compared with \$1,022,577.93 for all of calendar year 2005). At the present time, Tim has 586 open matters. He has tracked the resolution of 378 matters since the beginning of 2005. The average per case collection has been \$6,226.82.

#### **Audits**

AAG Rebecca Polizzotto prevailed in her administrative hearing related to the recoupment of Medicaid overpayments from Hidden Heights Assisted Living Home in the amount of \$47,686.79. The hearing officer issued a proposed decision in this case on July 13, 2006. It is anticipated the commissioner will approve the proposed decision. The department is now determining how to proceed with respect to recoupment of these overpayments.

AAG Polizzotto continues to provide day to day advice to the Department of Health and Social Services in evaluating and improving the audit process, including working on new regulations.

#### **Licensing**

As of July 1, 2006, this section took over Day Care licensing from Labor and State Affairs and AAG Rebecca Polizzotto has been off and running ever since. The presence of a full time licensing attorney has been felt immediately and has been well received by the department's licensing workers. There is a lot going on with implementing the omnibus licensing bill

and the new regulations, but everything appears to be running smoothly.

AAG Polizzotto has six open Assisted Living Home files; eight pending foster care matters in various stages of litigation; and two pending day care matters. She also assisted in fining a residential child care provider \$10,000.00 on a licensing violation.

AAG Polizzotto is also preparing a work plan for training, policy, and procedure development to follow the statutory and regulation changes. By all accounts, the transition of licensing to this section has been effective and smooth, but very busy.

### **Labor and State Affairs**

#### **Alaska Public Offices Commission**

***Republican Moderate Party and Metcalfe v. Stevens.*** APOC issued its decision on June 28 in one of Ray Metcalfe's complaints against Senator Ben Stevens for failure to report as required in the legislators' financial disclosure law. APOC construed the requirement to report an interest in business broadly to cover the ownership of an option to purchase part of a business at a fixed price after amendments to AS 39.50.030(b)(2) & (3) became effective in 2003. The APOC also required the senator to report his work as a director or board member of a corporation (the Alaska Fisheries Marketing Board) before the corporation filed its articles of incorporation with the state. The reasoning was that the work of incorporating and adopting by-laws was relevant for reporting a business interest. AAG Jan DeYoung advised APOC.

#### **Retirement & Benefits**

***Alaska Public Employees' Association v. State, Dept. of Admin, Div. of Retirement & Benefits.*** On July 3, Superior Court Judge Weeks denied the unions' motion for a temporary restraining order to enjoin implementation of legislative changes to the Public Employees' Retirement System (PERS) establishing a tier IV of benefits (and a tier III in the Teachers Retirement

System) for employees hired on or after July 1, 2006. The basis argued for delaying the changes was the unions' allegation that the new system would not be a qualified plan under IRS rules. AAG Gina Ragle handled the case for the state.

***Division of Retirement and Benefits v. James.*** The state obtained a default judgment for \$20,000 on July 5. The member claimed to have left her city employment and then withdrew her PERS money when in fact she had not separated. The complaint alleged the PERS money was fraudulently obtained. AAG Toby Steinberger represented the division.

***Randolph Mitchell v. Div. of Retirement & Benefits.*** On July 10, the Office of Administrative Hearings issued a proposed decision that would affirm the Administrator's decision Mr. Mitchell does not have an occupational or non-occupational disability, and is capable of the maintenance work he performed at the National Guard. After providing the parties an opportunity to object to the decision, the OAH will issue a final decision. The division was represented by AAG Toby Steinberger.

***Weaver v. State.*** This retirement benefits claimant filed for summary judgment and for a declaration that he was exempted from 2 AAC 35.291, which provides that a PERS member may no longer receive occupational disability benefits after the member returns to work in a PERS position earning 75% or more of the member's former PERS wages, adjusted for inflation. The court granted the motion, ruling the Division of Retirement and Benefits did not notify Weaver of the rule before either his employment (which predated the regulation) or the date of his disability.

The court prohibited the retroactive application of the regulation, reasoning, by analogy, that regulations may not be applied retroactively under the APA (which does not apply to PERS) and statutes may not be applied retroactively unless

the legislature expressly provides. AAG Toby Steinberger represented the division.

### **Special Thanks**

To AAG Mike Mitchell for covering additional assignments for OMB and to AAG Gina Ragle for work in Quality Sales' bid protest.

### **Legislation Regulations**

During July 2006, the Legislation and Regulations Section spent an active month editing draft legislation for the 2006 third special session. The third special session convened July 12, 2006.

The section also performed legal reviews of several regulations projects, including: (1) Board of Fisheries (Bristol Bay Area Naknek River Special Harvest Area); (2) State Board of Registration for Architects, Engineers, and Land Surveyors (exams, authorizations, continuing education); (3) Real Estate Commission (education requirements, activities by unlicensed persons, interest on claims paid from the real estate surety fund, and payments to persons licensed in other jurisdictions); (4) Department of Law (charitable solicitation registration requirements); (5) Regulatory Commission of Alaska (accounting, cost recovery, and reporting requirements for dismantlement, removal, and right-of-way restoration obligations for pipelines; Alaska Intrastate Inter-exchange Access Charge Manual); (6) Department of Environmental Conservation (drinking water and long-term enhanced surface water treatment requirements; seafood processing; avian flu laboratory fees; water quality standards for residues); (7) Department of Health and Social Services (home and community-based waivers); (8) Division of Elections (precinct boundaries for Palmer and the North Slope Borough); (9) Board of Veterinary Examiners (licensure by examination); (10) Department of Commerce, Community, and Economic Development (sponsors of apprentice trainees in mortuary science); and (11) Alaska Energy Authority (allocation of supplemental appropriations after pro rata reductions for the power cost equalization program).

The section is making plans for the annual regulations training classes in September 2006 for state agencies and assistant attorneys generals. The classes are planned for Anchorage and Juneau.

## Natural Resources

**Alaska Challenges Federal Attempt to Unilaterally Establish Federal Reserved Water Rights and Expand Jurisdiction over State Lands through Rulemaking.** On Friday, July 14, 2006, the State of Alaska, through outside counsel, William P. Horn, filed its opening brief in a case challenging the Federal government's attempt to use the rulemaking process to conclusively establish and exercise Federal Reserved Water Rights (FRWR) and to treat state lands as "federal public lands" in Alaska. *Katie John v. United States* (A05-0006-CV (HRH) (Consolidated)).

The case, originally filed in January of 2005 as *State v. Norton*, challenges 1999 Department of Interior and Department of Agriculture regulations establishing and exercising FRWR on thousands of rivers and streams in Alaska without complying with any of the traditional requirements for establishing FRWR. The regulations also claimed and exercised FRWR in salt and inter-tidal waters overlying state owned submerged lands and asserted jurisdiction over state owned lands within the boundaries of federal conservation system units and downstream from those units. Although minor corrections to the regulations were recently adopted, 70 Fed. Reg. 76400 (December 27, 2005), the majority of the regulations remain unchanged, and the federal agencies continue to assert they can unilaterally establish and exercise FRWR through rulemaking without quantification or adjudication of those rights. *Id.* at 76403. AAG Steven Daugherty worked with ADF&G and Mr. Horn on these issues.

***Eastham v. Price* (state not a party).** Tom Price, a landowner in Homer, was sued by a group of snowmachiners in 1999 to establish that a trail across Price's land was a public prescriptive easement. The trial court found a prescriptive easement. After two supreme court appeals, the case is currently before Judge Brown in Kenai for a factual determination of the scope of the easement and for determination of issues surrounding whether or not the current use of the easement is consistent with the use that originally gave rise to the easement.

Price, who is pro se, subpoenaed three Fish & Game employees and two DNR employees to testify at the hearing. Although it was decided initially not to move to quash those subpoenas, even though the employees likely did not have evidence that would be allowed at the hearing, Price did not stop there, and also subpoenaed Governor Murkowski to testify.

As disclosed in subsequent filings, he wanted to ask Governor Murkowski whether he would "direct State of Alaska employees to take actions (as he rightfully should and is incumbent upon him to do) to immediately and pro-actively direct State of Alaska employees to re-align the public prescriptive easement away from the Defendant's land, and this would be consistent with the public authority that has exercised dominion and control at the Anchor River riverine system for trails in the region since the Defendant's land is the start of an eastern fork of the Anchor River and the Department of Natural Resources State Parks Deep Creek/Anchor River Off-Road Vehicle Trails Plan or similar program, or 'lesser fractal pony-program' which would be consistent with the state goals and guidelines of that trails plan program?" Price also wanted to ask Governor Murkowski if he would take such action if Price provided \$10,000 to \$30,000 in funding.

It was first requested that Price voluntarily release the governor and the F&G employees from their subpoenas. The defendant Price agreed to do so, but only if his non-party son, who is directing the litigation, would also agree. The son refused, and AAGs Kevin Saxby and Colleen Moore filed, on expedited consideration, motions to quash the subpoenas to the governor and the F&G employees and to limit the testimony of the DNR employees. Judge Brown granted the motions over the objections of Price.

***Grunert v. Campbell.*** On July 25, 2006, U.S. District Court Judge Burgess granted the state's motion to dismiss the case of *Grunert v. Campbell* on mootness grounds. The case had challenged the validity of the Chignik cooperative commercial salmon fishery regulation under the federal and state constitutions. The co-op regulation was ruled invalid on statutory authority grounds by the Alaska Supreme Court on April 21, 2006 and had been repealed by the Board of Fisheries. The court also refused to reconsider its earlier ruling denying, on absolute legislative immunity

grounds, plaintiffs' motion to amend their complaint to seek money damages from individual members of the Board of Fisheries under 42 U.S.C. Sec. 1983 or 1985.

**Parks Highway Fire Restitution Sought.** At the very end of June, the state filed suit against the person who was responsible for starting the 80,000-plus acre Parks Highway Fire. AAG Kevin Saxby filed the complaint in Fairbanks, and it was served just before the responsible party left the state for a new job assignment. The state is seeking restitution of over \$7,000,000 spent to date in suppression costs, and double damages. The fire began when a private landowner dumped, or had his son dump, ashes from a portable fire pit onto flammable vegetation.

### Oil, Gas and Mining

**Tax Settlement.** The State of Alaska reached an agreement with an oil and gas taxpayer to settle a number of outstanding tax issues for \$66.3 million. The dispute was over the amount of taxes owed by the taxpayer under the Alaska Net Income Tax Act for tax years 1999 and 2000. Alaska tax statutes require the specific terms and conditions of the agreement to be kept confidential. AAG Tina Kobayashi assisted the Department of Revenue in the dispute and settlement.

#### ***Friends of Mat-Su, et. al. v. State of Alaska, Department of Natural Resources.***

On July 14, the Palmer Superior Court issued an order granting the State of Alaska's Cross Motion for Summary Judgment in *Friends of Mat-Su, et al. v. State of Alaska, Department of Natural Resources*, 3PA-04-855 Cl. This lawsuit, brought by Friends of Mat-Su and the Katchemack Bay Conservation Society, challenged the department's issuance of coal bed methane leases in both the Matanuska and Susitna valleys and on the Kenai Peninsula. The complaint alleged violations of the statutory notice requirements of AS 38.05.177 and 38.05.945, violations of Art. VIII §§ 1, 2, 3, and 10, and the Public Trust Doctrine of the Alaska Constitution, and violations of the Matanuska Valley Moose Range Conservation Plan. The Court found for the Department of Natural Resources on all counts.

***Northern Alaska Environmental Center, et al. v. Kempthorne.*** The Ninth Circuit Court of Appeals has issued a decision upholding the decision of the U.S.

District Court for the District of Alaska in *Northern Alaska Environmental Center, et al. v. Kempthorne*, No. 05-35085. The Plaintiffs-Appellants in this case consist of Northern Alaska Environmental Center; National Audubon Society; the Wilderness Society; Natural Resources Defense Council; Sierra Club; Alaska Wilderness League; and the Center for Biological Diversity.

The Plaintiffs argued that the Final Environmental Impact Statement ("FEIS") prepared by the BLM was inadequate for its plan to offer long term oil leases in the Northwestern Planning Area of the National Petroleum Reserve - Alaska (NW NPR-A). Their challenge included allegations that the BLM violated the National Environmental Policy Act ("NEPA") because the FEIS, 1) failed to evaluate sufficiently site specific environmental consequences, 2) failed to consider reasonable alternatives, 3) did not discuss mitigation measures, and 4) did not assess the cumulative impacts of leasing and other activities that they claimed were reasonably foreseeable. They also argued that the Biological Opinion issued by the Fish and Wildlife Service violated the Endangered Species Act ("ESA").

The State of Alaska, ConocoPhillips and the Arctic Slope Regional Corporation were granted intervention as defendants in the lawsuit. On January 10, 2005, the U.S. District Court issued an order in favor of the Defendants, finding that the BLM and the Fish Wildlife Service had fully complied with the requirements of NEPA and the ESA. Plaintiffs then filed an appeal in the U.S. Court of Appeals for the Ninth Circuit and briefing followed. Oral argument was held on September 15, 2005 in Seattle before a three judge panel consisting of Chief Judge Mary M. Schroeder, Judge Arthur L. Alarcon and Judge Andrew J. Kleinfeld and on July 26, the Court issued its decision upholding the District Court's ruling.

### Opinions, Appeals and Ethics

For ethics matters, most of the work accomplished and advice given is confidential by law. However, it can be reported one new complaint was received and one complaint file was closed. Also, AAG Judy Bockmon, as designated ethics supervisor for the Department of Law, received and approved a significant number of annual outside employment disclosures from employees of the Department.

AAG Dave Jones continues to respond to questions relating to political activity restrictions. Five requests for conflict waivers were received for the month.

## Briefs

**PA v. State.** AAG Mary Lundquist completed the supplemental briefing in the *PA* appeal, which is before the Alaska Supreme Court. *PA* is an appeal by a non-offending father from an adjudication finding that his children were in need of aid based solely on the conduct of the mother. The father's main argument was that a finding that his children were children-in-need-of-aid based solely on the mother's conduct violated his substantive due process right to parent.

After the initial briefing and argument, the Court requested supplemental briefing on four questions: 1) Whether other states adjudicate children in need of aid based on offenses by one parent and over the objections of the non-offending parent; 2) Whether other states have found children to be in need of aid where the past conditions have been alleviated by the time of the adjudication; 3) Whether the state has an obligation between the temporary custody hearing and the adjudication to assist a non-offending parent in protecting a child from an offending parent; and 4) Whether the superior court's adjudication findings (which were both oral and written) were adequate for purposes of review.

## Decisions

**Gilbert M. v. State:** The Alaska Supreme Court affirmed the termination of a mother's parental rights in *Gilbert M. v. State*, \_\_\_ P.3d \_\_\_ (Alaska 2006). The case was unusual in that the mother did not appeal the termination order, but her father (the child's grandfather) did appeal. The grandfather's appeal was based on his claim he was the child's Indian custodian, from whose custody the child was initially removed. Under a provision of the Indian Child Welfare Act (25 U.S.C. § 1911) an Indian custodian arguably has standing to appeal the termination of the parental rights of a parent whose child is in the care of the Indian custodian.

The court did not decide this issue (although it noted in dicta that if the grandfather were the child's Indian custodian, "it seems he would have a right to appeal the decision.") The court focused on the facts of

the case, noting the grandfather's participation in the termination proceedings was based on his status as a grandfather rather than as an Indian custodian. The court also noted at the time of the termination the grandfather was incarcerated and was likely to remain so until after the child will have reached adulthood. The court held any claim premised on restoration of the grandfather's Indian custodian status therefore was moot.

Additionally, the court acknowledged the merit behind the appellant's claim that the trial court (applying longstanding state statutes and court rules) had employed an unconstitutional "preponderance of the evidence" standard of proof (all the parties to the suit conceded that a United States Supreme Court decision held that a higher standard was required by the United States Constitution). The court noted that during the pendency of the appeal legislation was enacted that increased the standard of proof to clear and convincing. AAG Mike Hotchkin handled the appeal.

**Jared S. v. State, DHSS, OCS:** The Alaska Supreme Court issued an MO&J in *Jared S. v. State, DHSS, OCS*, affirming the trial court's finding that a little girl was a child in need of aid based on her father's conduct. It rejected the father's argument that, at the adjudication trial, the trial court erred in finding, by clear and convincing evidence, that the child had been sexually abused. Acknowledging that cases of sexual abuse often turn on questions of credibility, the supreme court noted it is the role of the trial court to judge a witness's credibility and weigh conflicting evidence and that there was nothing in the record to indicate the trial court erred in performing this function.

The court also rejected the father's argument that the trial court erred in finding, by clear and convincing evidence, that the child was at substantial risk of suffering sexual abuse. In doing so, it stated that a trial court may, for the limited purpose of determining whether a child is in need of aid, consider evidence regarding the likelihood that the alleged perpetrator will engage in future sexual offenses. The supreme court then concluded the trial court did not err in making its finding. AAG Megan Webb represented the state in this appeal.

## Other Matters

The new hearing officer conduct code was applied for the first time in July, dismissing a complaint against an administrative law judge. The complaint alleged the administrative law judge demonstrated bias in connection with a hearing and may have engaged in ex parte communications. After investigating the complaint, it was concluded no probable cause supported the allegations.

***Alaska Dental Society and American Dental Association v. Alaska Native Tribal Health Consortium*, 3AN-06-4797 CI.** This case was remanded from federal district court to state superior court after the federal court determined the case did not involve a federal question and that the Tribal Health Consortium was not a federal contractor for purposes of federal court jurisdiction. During the remand hearing the plaintiffs agreed to dismiss two of the four counts raised in their complaint, which arguably did implicate a federal question. All pending motions, including the State of Alaska's motion to intervene as a defendant, were remanded to the state court. The Tribal Health Consortium promptly moved in state court to dismiss the case for failure to state a claim. That motion currently is pending, as is the state's intervention motion. The plaintiffs have indicated their intention to ask leave to amend their complaint. AAGs Mike Hotchkin and Paul Lyle are handling the case.

***Clugston v. Smith, et al.*** AAG Megan Webb filed a motion to dismiss in *Clugston v. Smith, et al.* in federal district court on behalf of five state employees, arguing that Mr. Clugston's challenge of a child support order was barred under the Rooker-Feldman doctrine, that the order did not constitute an unconstitutional bill of attainder, and that the federal district court did not have the authority to impeach a state court judge, disbar an attorney or judge, or terminate a state employee's employment.

## Regulatory Affairs & Public Advocacy (RAPA)

### Pre-Filed Testimony

***U-05-103, AWWU (Wastewater Division)*.** On July 7th, RAPA pre-filed the direct testimony of DOL utility financial analyst Janet Fairchild regarding the revenue requirement of the wastewater division (ASU) of AWWU.

ASU requested an across-the-board 10.6% rate increase.

The Fairchild testimony evaluates the utility's test year operating revenues and expenses, related pro forma adjustments, and the utility's rate-base and requested rate of return. Her analysis identifies a utility revenue deficiency of only 6.2%, inclusive of disputed MUSA payments. (Still pending is a Superior Court decision on the utility's appeal of the prior RCA decision to reject the inclusion of utility MUSA payments in rates. 59% of the ASU's proposed operating expense increase in this case is attributable to increased MUSA payments to the Municipality of Anchorage.) This case is scheduled for hearing on October 3, 2006.

### Hearing

#### ***U-06-02, Enstar/Marathon gas supply contract.***

Enstar filed a proposed gas supply agreement (GSA) with Marathon Oil Co. for supply of natural gas from Marathon's proven reserves in the Cook Inlet beginning in 2009. The contract proposes to use a 12-month average of the Henry Hub Index (HHI) to price the gas. The AG/RAPA opposes the use of HHI under the circumstances and has proposed an alternative pricing proxy.

As scheduled, the case went to hearing from July 6-14, 2006. However, at the conclusion of the cross-examination of Enstar's witnesses on July 14<sup>th</sup>, the RCA 'recessed' the hearing until further notice. No other parties, including the AG/RAPA and Tesoro, had yet presented their direct cases/witnesses. Also, the RCA had not ruled on Marathon's refusal during the hearing to comply with a Commission Order to produce information to Tesoro related to Marathon's export of LNG.

The parties await the issuance of an RCA Order indicating when and how the proceeding will resume or otherwise continue toward adjudication.

## RAPA Intervention Summary Update

As of July 24, 2006, RAPA is involved in 17 dockets before the RCA. That number includes sixteen adjudicatory matters in which the Attorney General has elected to participate as a party and one rulemaking proceeding in which RAPA has participated in ongoing workshops. RAPA also monitors numerous other matters before the RCA and provides policy analysis to the Attorney General, and through the Attorney General, to the Governor's Office, as requested.

## Torts & Worker's Compensation

**Trial court finds non-economic damages cap constitutional.** In *Brown v. LDG, Inc.*, Superior Court Judge Morgan Christen upheld the constitutionality of AS 09.17.010's cap on non-economic damages. Following a jury's award of damages exceeding the cap, the court found that the statute was constitutional both on its face and as applied to multiple beneficiaries in a wrongful death case. The court found the cap limited the total non-economic damages to be awarded; each beneficiary receives only a share of the capped damages. The court rejected plaintiff's contention the statute should be interpreted so as to give each beneficiary a separate award (effectively increasing the cap), and found the non-economic damage cap did not violate the right to equal protection to make the beneficiaries share in the award. The court also rejected the argument that the damages cap violates the right to jury trial. After ruling on the application of the damages cap, Judge Christen entered final judgment and dismissed the case.

AAG Ruth Botstein prepared and submitted the state's brief on the constitutionality of AS 09.17.010 after notice by the court of the constitutional challenge. The State was not a party to the underlying litigation.

**The Alaska Supreme Court accepted two Petitions for Review, arising from the same trial court matter.** The section filed two petitions for review and a motion to stay trial in a case litigated in Fairbanks against the Office of Children's Services and a social worker sued individually. The Supreme Court recently accepted the petitions, which were filed in December and January, in *Sullivan v. State OCS, et al.* The Supreme Court

also granted the state's motion to stay the trial court proceedings.

The first petition seeks review of the trial court's denial of qualified immunity to the social worker for the 42 U.S.C. §1983 claims. The Petition alleges the Court applied the wrong test in rejecting qualified immunity. It applied the state law "official immunity" test, rather than the federal qualified immunity test applicable to §1983 claims.

The second petition challenges the trial court's application of collateral estoppel against the social worker and OCS for findings made in a parental rights termination trial. The court ordered that the agency and individual social worker were precluded from attacking any of the findings made in the termination trial. The petition argues the court mistakenly applied the law of collateral estoppel against the social worker and OCS in this subsequent tort case for damages.

The trial court matter is being defended by AAG Gene Gustafson; AAG Megan Webb of the Opinions, Appeals and Ethics section is writing the Petition briefs.

**Summary judgment granted in favor of the State in Anchorage case arising out of a child protection matter.** Anchorage superior court judge Mark Rindner granted summary judgment to the state in a case arising out of a child protection matter. *McGrew* was a case that had been to the Supreme Court on an earlier grant of summary judgment (affirming dismissal of negligence claims made by grandparents of a child found to be in need of aid) and remanded on the remaining claim of intentional infliction of emotional distress. On remand, the superior court held plaintiffs could not meet their threshold burden of proving outrageous conduct or severe emotional distress necessary to their claim for intentional infliction of emotional distress. It does not appear plaintiffs will appeal this decision. The case on remand was defended by AAG Dave Floerchinger.

**Ninth Circuit oral argument in case alleging excessive force.** The section took an interlocutory appeal to the Ninth Circuit from the U.S. District Court's denial of qualified immunity in a §1983 case brought against several Alaska State Troopers. Oral argument was scheduled this month during the Court's annual visit to Alaska. The case involves a motor vehicle stop

and field investigation including a pat down search for officer safety. AAG Stephanie Galbraith is representing the troopers in this case.

## Transportation

**Ninth Circuit oral argument in challenge to Iliamna-Nondalton road.** Former Transportation section and current Labor & State Affairs section AAG Larry McKinstry argued a Transportation section case before the Ninth Circuit Court of Appeals. The case involved a challenge by Robert Gillam to the construction of a proposed highway between Iliamna and Nondalton. Gillam argued the Department of Transportation and Public Facilities' system for allocating funds for rural highway projects violated the civil rights and equal protection rights of non-rural residents. The argument was reported in the Anchorage Daily News at: <http://www.adn.com/news/alaska/story/8006155p-7899249c.html>. Gillam has other cases in progress challenging the construction of the Iliamna-Nondalton Road.

**Juneau Access project.** Senior AAG Peter Putzier helped the Department of Transportation and Public Facilities convince the City and Borough of Juneau Assembly to give local concurrence to the Juneau Access project, which calls for the construction of a road from Juneau along the east side of Lynn Canal to the Katzeihin River, with shuttle ferries to Haines and Skagway. The City and Borough Planning Commission had recommended earlier in the month that the Assembly not concur with the project. Nonetheless, the Assembly did approve the project in a five - two vote.

## CRIMINAL DIVISION

### Anchorage DAO

**Jack Morrell convicted of murder in the second degree in Taco Bell killing.** On February 27, 2004, Jack Morrell was in line at the drive-up window of the Taco Bell on East Fifth Avenue in Anchorage when, intoxicated, he bumped into the vehicle ahead. The driver whose vehicle he struck, Eric Kalenka, got out to talk to him. Talking in a loud and excited voice, Kalenka berated Morrell for hitting his vehicle. Morrell

got out of his vehicle, followed Kalenka back to his car and grabbed him. A struggle ensued. The struggle moved to the front of both cars, where the two men fell to the ground. During the struggle on the ground, Morrell used a knife to stab Kalenka seven to eight times. One stab wound was in the leg and cut a principal artery or vein. A third driver pulled Morrell off Kalenka. Kalenka went back to his car, where he sat in a growing pool of blood until police and paramedics arrived. He was pronounced dead at the hospital.

ADA Adrienne Bachman handled the trial, which started on June 20 and ended in a verdict on July 10. Morrell was found guilty of murder in the second degree. Sentencing is scheduled for October 6.

**Keith Landers convicted of murder in the first degree for killing his wife during divorce case.** On November 19, 2004, Keith Landers, age 72, killed his wife of some 29 years, Rose Evangeline Landers, by shooting her in the back of the head.

The Landers were in the process of getting a divorce in court and had agreed on a division of personal property. Mrs. Landers was still living in the family home in Eagle River where she and her friend, Jorene Hout, had boxed up the personal property for Keith Landers to pick up. They were at the family home that morning when Keith Landers arrived to pick up his property. When he got there he complained that by his wife's boxing the property, he could not tell whether the division was in accordance with their agreement. Because Rose Evangeline Landers and Jorene Hout had plans to run errands and did not want to argue, they decided to leave Keith Landers at the house to make whatever corrections he chose.

After the two women left, Keith Landers left the house and went to his own house in Anchorage. There, he armed himself with two handguns and then returned to the Eagle River home. When Rose Evangeline Landers and Jorene Hout returned, Keith Landers went to the basement where he dropped some dishes piled there. Suspecting he was deliberately destroying dishes, Rose Evangeline Landers and Jorene Hout went down to the basement. When they got there, he broke more dishes.

The two women started back up the stairs. As they did so, Keith Landers grabbed Jorene Hout and pulled her back down the stairs. He pointed a gun at her

and fired a shot but she ducked just as he fired. Then, Keith Landers went upstairs after his wife; when he found her, he shot her in the back of the head.

Landers then went next door to a neighbor's house and told them he had just shot his wife. He also said he had planned to shoot himself, but did not have the courage to do it.

At the trial in July, 2006, Keith Landers, now 74-years-old, moved around the courtroom like a decrepit old man. The jury did not give into the sympathy factor, however, but instead voted to return a guilty verdict of murder in the first degree as to Rose Evangeline Landers, and attempted murder in the first degree as to Jorene Hout. It took them about three hours to find Landers guilty after a 12-day trial. ADA Sharon Illsley tried the case for the state. Sentencing is set for October 9.

**Lance Hinson sentenced to 70 years in jail for second degree murder of Tina Shangin.** On August 6, 2000, three men walking in the wooded area along the Glenn Highway between Bragaw Street and Airport Heights Boulevard found the nude body of Tina Shangin in the woods. Shangin had been missing for about a month. Prior to the victim's body being discovered, Hinson told a member of the victim's family Tina was dead and her body was near the Northway Mall (which is the area where the body was ultimately found). Another member of the victim's family told police Hinson pointed out the place where Tina would be found before she was actually found. At about the time of the victim's disappearance, a family member told police she had seen Hinson with a cut to his eye as though he had been in a fight.

In addition, vaginal swabs from the victim showed spermatozoa identified as Hinson's by DNA analysis. Unfortunately, DNA analysis also showed spermatozoa from a second, unidentified person, so the defense at trial was the other man killed her.

The trial took place between January 18 and February 4, 2005, when the jury convicted him of second degree murder; however, the sentencing was delayed for a year and a half. Part of the delay was explained by the fact that, when Hinson's DNA was sent to the laboratory, there was a CODIS hit on a 1991 case, the murder of Martha Jimmy, during which investigation the medical examiner found semen in her

vagina. The semen was Hinson's. The state had chosen not to introduce the evidence of the Martha Jimmy case at Hinson's sentencing, but the judge pressed the point, only to agree later that it was best kept separate.

On July 26, 2006, Judge Stephanie Joannides sentenced Hinson to 70 years in jail for Tina Shangin's 2000 murder - 99 years with 29 suspended. He was denied eligibility for parole for 40 years.

ADA Sharon Illsley also represented the state in this case at the trial in 2005, at numerous sentencing hearings leading up to July 26, 2006 and then at the final, July 26, 2006 sentencing hearing.

### [Fairbanks DAO](#)

For the month of July, the office received 82 new felony referrals. Of the 80 referrals, 16 were new felony drug cases, eight were new felony DUI cases, four were new sex or sex related cases, and 15 were for new felony assault cases. The grand jury returned 34 indictments for the month.

The downward trend in misdemeanor DUI's that started in May and continued in June reversed itself this month with 76 new DUI arrests. The unit also received 70 assaults, 48 driving while license cancelled, suspended or revoked, 25 property crimes and 19 minors consuming alcohol. Misdemeanor drug, miscellaneous misdemeanors and other liquor related offenses rounded out the remaining 332 referrals to the misdemeanor unit.

The month ended with a homicide as a result of a shooting from a marijuana deal that went sour. The purchaser informed the seller of the inability to come up with the agreed upon purchase price. The seller produced a handgun and shot the victim two times in the head.

### [Kenai DAO](#)

It was a good month for trials in Kenai and Homer; guilty verdicts were returned on all, including a felony assault, a domestic violence assault between two women, a failure to register as a sex offender, and a first degree sexual assault.

The grand jury indicted nine felony DUIs, seven drug cases, eight felony assaults, 13 assorted felonies, one

31-count sexual assault against a minor case, and one attempted murder.

One of the felony DUI defendants was not in jail at the time of grand jury because he was injured in the collision and hospitalized. Grand jury ran late that day and the court elected to do returns on Monday. There was no occasion to ask for a warrant for his arrest at returns because he had already been arrested on his next felony DUI over the weekend.

The attempted murder case would make a great plot for a movie. A cabdriver picked up a male at a hotel in Anchorage and was told to drive him to the mountains. The trip got involved and the passenger eventually decided he wanted to go to Soldotna.

As the cabdriver was attempting to input the passenger's credit card information to pay for the trip, the passenger reached around and sliced the driver's throat almost ear to ear with a box knife. The driver eventually managed to get the knife away and the passenger grabbed the driver's wrist, attempting to point the knife back at the driver to slice him again. The driver held him off but the passenger produced a screwdriver and jabbed the driver multiple times, which was witnessed by other motorists who called the troopers. The passenger was still in position on top of the driver when they arrived.

The defendant/passenger holds a U.S. passport from Puerto Rico; he has been in numerous countries in the last few months, including Korea, Dubai, and South Africa, paying in cash for all of his airline tickets.

As for the most bizarre event of the month, a defendant had a hearing and failed to appear. His son called the court and was told to bring his father in for his hearing. The only problem was that dad had died over the weekend and the son brought in his ashes and displayed them for the court. The son cried, literally, that the court had kept the two of them apart and he never got to have his last cheeseburger with his father. The son was the victim of a felony assault with a gun by the father.

### **Special Thanks**

None of the trials were easy this month and everyone did a great job, including the paralegals and law

office assistants who took care of all the paperwork and sorted out the witnesses.

### **Ketchikan DAO**

A Ketchikan jury found Boyd Muzzana guilty of assault in the third degree but hung on other charges of attempted murder in the first degree and two counts of assault in the second degree. A retrial has been set.

Mr. Muzzana attacked his girlfriend with an ax, missing her and hitting the railing of his deck. When she ran away, he grabbed her and strangled her, but she was able to break free. Muzzana left Ketchikan after the attack and went to Metlakatla where the police contacted him the same day. He had altered his appearance by using a knife to dry shave off his large mustache leaving cuts on his face. He also told the troopers he was intending to turn himself in and take responsibility. The assault conviction was for placing the victim in fear of imminent serious physical injury by means of the ax.

A Craig jury found Casey Freeman not guilty of furnishing alcohol to minors.

Terry Simpson was indicted for sexual assault in the second degree for having sexual intercourse with a girl who was passed out. His DNA was recovered from the sperm retrieved from the victim and he apologized for having sex with her.

A candidate for state representative in Ketchikan, John Hanson, was arrested and indicted for assault in the second degree and third degree for threatening and pistol whipping his wife with a handgun. After he was charged, Hanson withdrew his candidacy.

Gary Morris was indicted for assault in the second degree for strangling his girlfriend.

Matthew Freer was indicted for assault in the third degree for threatening his 77-year-old neighbor with a chainsaw.

Other offenders during the month were indicted for failure to stop at direction of police officer, vehicle theft, misconduct involving controlled substances in the fourth degree, and felony DWI.

## Kodiak DAO

A 27-year-old Kodiak man was sentenced to three years in prison with none suspended following his conviction for assault in the third degree. This defendant had used his hand to strangle his domestic partner during an argument. Thanks to the intervention of neighbors the victim was not seriously injured. The sentence was aggravated because he had one prior misdemeanor assault against a prior domestic partner.

A 22-year-old Kodiak man was sentenced to five years in prison with three years suspended, and probation for seven years following his conviction for second degree theft, a class C felony offense. This defendant was responsible for a rash of burglaries around Kodiak. He would enter unlocked and unoccupied homes to steal food, small amounts of money, and easily transportable items like cameras. In fact, it was the tracing back of a stolen camera in the possession of the police department that broke the case.

A 45-year-old Port Lions defendant was sentenced to a combined sentence of 18 months in jail with 15 months suspended following his conviction for a misdemeanor assault on his domestic partner, followed by another misdemeanor assault on her adult son when he came to her aid. This defendant will be placed on probation for five years following his release from incarceration, during which time he must enroll in and complete an anger management class as well as be screened for alcohol abuse and complete any treatment as will be recommended. He was also ordered to completely refrain from the ingestion or possession of any alcoholic beverage for the five year period of his probation.

A 29-year-old Kodiak man was convicted of first degree eluding, a class C felony, and driving under the influence and driving without a valid license, both class A misdemeanors. He was sentenced 30 days to serve with an additional ten months suspended on the misdemeanor offenses, and sentenced to four months in jail for the felony eluding (six months total to serve). This defendant will also be placed on probation for five years once he is released from incarceration, during which time he will be restricted from consuming any alcohol will be undergoing substance abuse therapy and treatment.

In addition he was required to pay \$4100 in fines and surcharges.

## Palmer DAO

On July 7, 2006, Palmer Superior Court Judge Eric Smith sentenced Gordon K. Carvalho to 20 years in prison on charges of robbery in the first degree, misconduct involving weapons in the third degree, felony eluding, assault in the third degree on a police officer and vehicle theft. Carvalho went on a crime spree in May of 2005, which included stealing vehicles, stealing a firearm, taking drugs and driving vehicles erratically through school zones and residential neighborhoods, even after being shot in the face by an Alaska State Trooper. Carvalho was on bail release and on felony probation during the commission of these offenses. Carvalho received an additional year and four months for violating his probation. DA Roman Kalytiak was the prosecutor in this case.

After remand from the Court of Appeals, Judge Smith granted the state's motion for summary judgment in the post-conviction relief case of *Sarah J. Coffman v. State*, 3PA-S97-1611 CR and 3PA-04-00108 CI. In 1996, Coffman was convicted after a jury trial of murder in the second degree, and burglary in the first degree for her role in a drug-related home invasion and killing. The initial post-conviction relief action was dismissed by the superior court, but was remanded back by the Court of Appeals for further proceedings in superior court. ADA Suzanne Powell handled this case.

Jimmie Dale was convicted after a jury trial of two counts of assault in the first degree, two counts of assault in the third degree, and felony leaving the scene. The trial prosecutor was ADA Suzanne Powell.

After a jury trial, Thilo Jammes was convicted of burglary in the second degree, criminal mischief in the fourth degree, theft in the third degree, and criminal trespass. ADA Suzanne Powell tried this case.

Carlos Navarro was sentenced to a composite sentence of ten years with six years suspended on multiple burglary, and theft charges relating to burglaries in the Willow and Sutton areas where firearms, jewelry and electronics were stolen. Navarro did not have any prior felony record. ADA Suzanne Powell tried the case as well.

A Palmer jury convicted Andrew Moffitt of felony failure to appear. Moffitt had two trials earlier this year where he was convicted of drug felonies. ADA Curtis Martin tried the case.

After a bench trial, Christopher Holsclaw was convicted of felony DUI and driving without a valid license. ADA Richard Payne was the prosecutor.

Joseph Price was arrested on two counts of sexual abuse of a minor in the third degree for his relationships with two girls under the age of sixteen. Price, who is on parole from the state of Texas, met the victims at the state fair last year. ADA Rachel Gernat handled this case.

Thirty-eight people were indicted on new felony charges this month by the Palmer grand juries.

The Palmer CRP (Community Resource Program) court saw some participants graduate this month. The graduates worked hard and made phenomenal progress while in CRP. ADA Rick Allen, the prosecutor assigned to CRP, reports the project is a success with virtually a complete drop in recidivism among the participants. People who previously could not go for months without being arrested have learned new life skills and have become productive members of the community.

## [SAVE THE DATE](#)

September 11-13 DA/Victim Witness Paralegal  
Conference - Alyeska Resort

September 18-19 Civil Division Supervisor's Retreat -  
Alyeska Resort